

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDMUND KOKOWICZ,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2005

No. 251746

Macomb Circuit Court

LC Nos. 03-000026-FC;

03-000027-FH

Before: Judges O’Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (during felony), MCL 750.520b(1)(c), second-degree criminal sexual conduct (during felony), MCL 750.520c(1)(c), two counts of delivery of a controlled substance to a minor (non-narcotic, schedule 1), MCL 333.7410(1), possession of a controlled substance (analogue), MCL 333.7403(2)(b)(ii), and two counts of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to two terms of fifteen to thirty years in prison for the first-degree criminal sexual conduct convictions, five years and eleven months to fifteen years in prison for the second-degree criminal sexual conduct conviction, two terms of eight to fourteen years in prison for the delivery of a controlled substance to a minor convictions, one to two years in prison for the possession of a controlled substance conviction, and two \$45 assessments for the furnishing alcohol to a minor convictions. We affirm.

Defendant first argues that the trial court violated his due process right to an impartial jury by permitting the jurors to submit questions for witnesses during the trial. We disagree. Because defendant did not object to either the instruction that allowed the jurors to ask questions or to any specific questions submitted by the jury, this issue is unpreserved. We review unpreserved issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

A defendant claiming that the trial court erred in permitting jurors to submit questions must show that the trial court abused its discretion. *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972). Here, the court instructed the jurors that they may submit questions in writing after both parties questioned each witness. The trial court told the jurors that it would review each question for compliance with evidentiary rules before asking the question. See CJI2d 2.9. Defendant does not argue that the trial court abused its discretion, but instead, contends that the practice itself constitutes structural error warranting reversal irrespective of

prejudice. There is no merit to this argument. Properly screened questions from the jury enhance the purpose of the trial because they allow the factfinder to render a verdict based on clarified information. *Heard, supra* at 187-188; *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). Defendant failed to show any error because the questions were properly screened and our review of the questions reveals that they did not reflect juror bias or prejudice. See *Heard, supra* at 188; *Stout, supra* at 733.

Defendant next argues that the trial court denied him a fair trial because it helped the prosecutor prove its case by questioning witnesses and lecturing the jury. We disagree. Because defendant did not object to the trial court's questions and comments at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 764-765.

There are no fixed guidelines that limit what a trial judge may say. The trial court has wide, but not unlimited, discretion and power in matters of trial conduct. MCL 768.29; *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The principal limitation on a court's discretion over trial conduct is that its actions must not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Paquette, supra* at 340.

Defendant claims that the trial court improperly lectured the jury that the absence of DNA evidence was "no big deal." However, the court questioned the police witness to clarify why DNA analyses on samples taken from one of the victims were not available at trial. Jurors could draw their own conclusions about the absence of DNA evidence. The trial court did not err when it clarified why DNA evidence was absent. Further, in light of defendant's testimony that he had ejaculated on the victim's underwear and on her vagina, defendant was not prejudiced by the explanation of the absence of DNA evidence.

Defendant next claims, erroneously, that the trial court improperly lectured the jury about Michigan's Rape Shield Law, MCL 750.520j. However, defendant does not argue that the court misstated the law in any way. It is the trial court's role to explain to the jury the law applicable to the case. MCL 768.29. The rape shield law was relevant here to clarify why the court had sustained the prosecutor's relevancy objection to a question about the victim's body piercings. The trial court's correct explanation of an evidentiary matter was not error.

Defendant also argues that the trial court denied him a fair trial by questioning the victims during their testimony, helping the prosecution prove its case. A trial court may question a witness to clarify testimony or elicit additional relevant testimony, provided its questioning does not pierce the veil of judicial impartiality. MRE 614(b); *Davis, supra* at 52; *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). The court's questions must not be intimidating, argumentative, prejudicial, unfair, or partial. *Conyers, supra* at 405. Establishing that the court improperly assumed the prosecutorial role requires more than simply showing that testimony elicited by the court damaged a defendant's case. *Davis, supra* at 51.

Here, our review of the questions reveals that the court did not pierce the veil of judicial impartiality because the questions assisted the factfinder and could have been asked by either party. *Id.* at 52. There is also no indication that the court's questions were intimidating or

argumentative. The court asked questions in order to clarify testimony and to elicit relevant evidence. MRE 614(b). Defendant has failed to show error, plain or otherwise.

Affirmed.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot